

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MUNJED AL MUDERIS, an individual dba
OSSEOINTEGRATION GROUP OF
AUSTRALIA, and OSSEOINTEGRATION
INTERNATIONAL PTY LTD., an Australian
limited company,

Case No.: 2:19-cv-01002-APG-DJA

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

[ECF No. 44]

Plaintiffs,

V.

FRED HERNANDEZ, an individual, and
AMPUTEK, INC., a Nevada corporation,

Defendants.

The plaintiffs move for summary judgment on their claims. ECF No. 44. The defendants
not respond. The defendants have offered no evidence to rebut the plaintiffs' factual
allegations or to create a genuine issue of material fact. The plaintiffs have shown they are
entitled to judgment as a matter of law. Therefore, I grant the motion.

I. ANALYSIS

Summary judgment is appropriate if the movant shows “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th Cir. 2018) (“To defeat summary judgment, the nonmoving party must produce evidence of a genuine dispute of material fact that could satisfy its burden at trial.”). I view the evidence and

1 reasonable inferences in the light most favorable to the non-moving party. *Zetwick v. Cnty. of*
2 *Yolo*, 850 F.3d 436, 440-41 (9th Cir. 2017).

3 **A. Factual Background**

4 The defendants have not answered or otherwise responded to the two sets of requests for
5 admissions the plaintiffs served upon them. ECF Nos. 44-3, 44-4. Therefore, those requests are
6 deemed admitted and “conclusively established.” Fed. R. Civ. P. 36(a)(3), (b).

7 Plaintiff Munjed Al Muderis is an orthopedic surgeon who developed the
8 osseointegration prosthetic limb (OPL). Al Muderis does business as Osseointegration Group of
9 Australia (OGA). He also owns plaintiff Osseointegration International Proprietary Limited Pty
10 Ltd. (OIP), which is a prosthetics company in Australia.

11 Al Muderis performed an OPL procedure on defendant Fred Hernandez. Hernandez
12 began publicizing the results of his procedure, and the plaintiffs later hired him to continue
13 acting as their spokesperson. The parties subsequently had a falling out and Hernandez began to
14 work for the plaintiffs’ competitors. Hernandez created and promoted defendant AmpUtek, Inc.
15 as a distributor of products for the plaintiffs’ competitors.

16 From April 2018 to September 2019, the defendants were paid at least \$5,000 per month
17 for promoting the plaintiffs’ competitors through the use of false and misleading statements,
18 including the statements identified below. From September 2019 to January 2020, the
19 defendants were paid at least \$25,000 for promoting the plaintiffs’ competitors through the use
20 of additional false and misleading statements.

21 The defendants created and published the Facebook.com posts that are attached to the
22 complaint as Exhibits 1 through 4. ECF No. 1 at 21-34. The defendants have admitted that the
23

1 following statements they published on Facebook.com (collectively, the Statements) are false
2 and misleading:

- 3 a. [A competitor's] parts are registered with the [United States Food and Drug
4 Administration].
- 5 b. To have [a competitor] perform osseointegration, the “[c]ost is half of what one pays in
6 Australia; yet patients undergo a comprehensive physio program that is headed by a
7 physicist (doctor of rehabilitation) and a team of accredited medical professionals.”
- 8 c. “The Dutch have been performing Osseointegration surgery since 2009, using press fit
9 implants. Their current implant is the newest device and most advanced on the market
10 today!”
- 11 d. “The letter [published on behalf of OIP] was not accurate, it was intended to deceive.
12 The Dutch utilize ce marked devices”
- 13 e. “[T]he letter [published on behalf of OIP] . . . is riddled with inaccurate statements and
14 flat out lies. . . . [T]he OGA surgeon . . . regularly instructed me to post what he wanted
15 and to refute any other opinion or team; whether it be factual or not.”
- 16 f. “Regardless of what Nick Birbas says; they DO have CE certification of their implant
17 and have performed over 200 cases.”
- 18 g. “The Dutch have spent the last 10 years not focusing on numbers or making money but
19 in collecting data, perfecting the technique and building a comprehensive physio
20 program; an actual system centered on team care; which is led by an actual Dr (sic) of
21 physical therapy (not simply a surgeons (sic) girlfriend who has less than a year
22 experience as a PT; yet is head of the program in Australia).”

1 h. "I smell a major cover up; as we have repeatedly asked for proof of CE certification or
2 if authorized by the Australian government as a custom; proof it was actually approved . .
3 . ."

4 i. Osseointegration surgery can be performed in the United States just as easily as it can
5 overseas and there is no need to travel overseas any longer to have the surgery performed.

6 The plaintiffs lost business as a result of the defendants' false and defamatory Statements.

7 They made a net profit of \$75,000 on each OPL surgery performed on patients in the United
8 States and Canada. Plaintiff Al Muderis performed 30 osseointegration surgeries on patients
9 from the United States and Canada in 2017 before the Statements were publicized. He
10 performed 24 such surgeries in 2018 and only four in 2019. Given the exponential increase in
11 patients in the years before 2018, it is likely that Al Muderis would have treated substantially
12 more than 30 patients from the United States and Canada in 2018 and 2019. The decrease of 32
13 surgeries over the two-year period results in at least \$2,400,000 in business losses as a result of
14 the defendants' Statements.

15 The plaintiffs move for summary judgment on their claim of false advertising and unfair
16 competition under the Lanham Act and on their defamation claim. They seek compensatory and
17 punitive damages and injunctive relief.

18 **B. Lanham Act Claim**

19 To prove a Lanham Act false advertising claim, the plaintiff must show:

- 20 (1) a false statement of fact by the defendant in a commercial advertisement about a
21 product;
- 22 (2) the statement actually deceived or has the tendency to deceive a substantial
23 segment of its audience;

9 The defendants have admitted that the Statements they published in their Facebook
10 marketing materials are false. They have also admitted that they used those false Statements to
11 market and advertise competing OPL products and services. Given the sharp decline in the
12 number of patients the plaintiffs treated in the United States and Canada after the defendants'
13 publication of false information, it is clear that the Statements were material and had the
14 tendency to deceive a substantial segment of the target audience. The plaintiffs were directly
15 harmed by the Statements, as evidenced by the loss of business after publication. The plaintiffs
16 are entitled to recover \$2,400,000 in lost business as a result of the defendants' violation of the
17 Lanham Act.

In addition to the lost profits, the plaintiffs suffered damages to their reputation and goodwill as a result of the false statements. Such damages are difficult to quantify. Thus, I also may award damages based on the defendants' profits. *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1407 (9th Cir. 1993), abrogated on other grounds by *SunEarth, Inc. v. Sun Earth Solar Power Co.*, 839 F.3d 1179 (9th Cir. 2016). On that point, the Lanham Act allows a successful plaintiff, "subject to the principles of equity, to recover (1) defendant's profits, (2) any damages

1 sustained by the plaintiff, and (3) the costs of the action.” 15 U.S.C. § 1117. “This recovery is
2 cumulative, that is, the Court may award [plaintiff] both its damages and [defendant’s] profits.”
3 *Babbit Elecs., Inc. v. Dynascan Corp.*, 38 F.3d 1161, 1182 (11th Cir. 1994).

4 From April 2018 to January 2020, the defendants were paid at least \$110,000 for
5 promoting the plaintiffs’ competitors through the use of the false and misleading Statements.
6 Thus, the plaintiffs are entitled to recover an additional \$110,000 as disgorgement of the
7 defendants’ profits.

8 I therefore award the plaintiffs \$2,510,000 for their Lanham Act claim (\$2,400,000 in
9 actual damages and \$110,000 as disgorgement of the defendants’ profits).

10 **C. Defamation Claim**

11 To prevail on a defamation claim in Nevada, a plaintiff must show: (1) a false and
12 defamatory statement, (2) unprivileged publication to a third person, (3) fault, amounting to at
13 least negligence, and (4) actual or presumed damages. *Pope v. Motel 6*, 114 P.3d 277, 282 (Nev.
14 2005). “A statement is defamatory when it would tend to lower the subject in the estimation of
15 the community, excite derogatory opinions about the subject, and hold the subject up to
16 contempt.” *K-Mart Corp. v. Washington*, 866 P.2d 274, 281-82 (Nev. 1993). A statement that
17 suggests the plaintiff lacks “fitness for trade, business, or profession” is defamatory per se. *Id.* at
18 282.

19 The defendants admit that the following Statements (collectively, the Defamatory
20 Statements) they published about the plaintiffs on Facebook.com are defamatory:

21 a. “The letter [published on behalf of OIP] was not accurate, it was intended to deceive.”

1 b. “[T]he letter [published on behalf of OIP] . . . is riddled with inaccurate statements and
2 flat out lies. . . . [T]he OGA surgeon . . . regularly instructed me to post what he wanted
3 and to refute any other opinion or team; whether it be factual or not.”

4 c. “The Dutch have spent the last 10 years not focusing on numbers or making money but
5 in collecting data, perfecting the technique and building a comprehensive physio
6 program; an actual system centered on team care; which is led by an actual Dr (sic) of
7 physical therapy (not simply a surgeons (sic) girlfriend who has less than a year
8 experience as a PT; yet is head of the program in Australia).”

9 d. “I smell a major cover up; as we have repeatedly asked for proof of CE certification or
10 if authorized by the Australian government as a custom; proof it was actually approved . .
11 . .”

12 Defendant Hernandez knew that the Defamatory Statements were false because of his
13 previous employment with the plaintiffs and his current employment with the plaintiffs’
14 competitors. Because the Defamatory Statements were aimed at and caused harm to the
15 plaintiffs’ business and profession, they are defamatory per se.

16 The damages caused by the Defamatory Statements are mostly duplicative of the
17 damages caused by the Lanham Act violations, and the plaintiffs are not seeking additional
18 compensatory damages at this time. ECF No. 44 at 21. Therefore, I will not award any
19 additional compensatory damages on this claim. However, given the nature of the defendants’
20 conduct, an award of punitive damages against the defendants is appropriate

21 “[P]unitive damages may be awarded when the plaintiff proves by clear and convincing
22 evidence that the defendant is ‘guilty of oppression, fraud or malice, express or implied.’”

23 *Bongiovi v. Sullivan*, 138 P.3d 433, 450-51 (Nev. 2006) (quoting Nev. Rev. Stat. § 42.005(1)).

1 In deciding whether to award punitive damages, a court should “consider numerous factors
2 including the defendant's financial position, culpability, and the extent to which this culpability
3 offends one's sense of justice.” *Evans v. Dean Witter Reynolds, Inc.*, 5 P.3d 1043, 1053 (Nev.
4 2000).

5 The defendants acted with malice when publishing the Defamatory Statements. They
6 knew the Defamatory Statements were false, yet they published them on the internet to harm the
7 plaintiffs' reputation and to bolster the financial gain for the defendants and the plaintiffs'
8 competitors. The defendants continued to publish the Defamatory Statements even after
9 receiving cease-and-desist letters. An award of punitive damages in the amount of \$100,000 is
10 appropriate to punish and deter the defendants' conduct. This amount is less than five percent of
11 the compensatory damages award, which is clearly reasonable under the circumstances.

12 **D. Injunctive Relief**

13 The plaintiffs request a permanent injunction prohibiting the defendants from making
14 further statements that violate the Lanham Act and defame the plaintiffs. “Nothing is clearer in
15 the . . . law of commercial free speech than that false or misleading commercial speech is clearly
16 subject to restraint.” *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1042 (9th Cir. 1986)
17 (citation and internal quotation marks omitted). *See also, MAI Sys. Corp. v. Peak Comput., Inc.*,
18 991 F.2d 511, 520 (9th Cir. 1993) (“As a general rule, a permanent injunction will be granted
19 when liability has been established and there is a threat of continuing violations.”).

20 The defendants' statements violated the Lanham Act. And the defendants have admitted
21 that, “unless a permanent injunction is entered against [them, they] will continue to publish the
22 [Defamatory] Statements on the Internet.” *See* ECF No. 44-4 at 9 (Plaintiffs' Second Set of
23 Requests for Admission, No. 52). The harm caused by future publications is very likely to be

1 difficult to calculate and prove. Harm to a plaintiff's reputation and goodwill is generally
 2 considered to be irreparable. *See Amini Innovation Corp. v. KTY Int'l Mktg.*, 768 F. Supp. 2d
 3 1049, 1057 (C.D. Cal. 2011) (company's "damages would be difficult to value due to the
 4 unknown impact on [its] goodwill"). And the public interest favors restraining the publication of
 5 false and misleading statements, especially as widespread as is possible on the internet. Thus, a
 6 narrow injunction barring publication of false and defamatory statements in the future is
 7 warranted.

8 E. Attorneys' fees

9 The plaintiffs request an award of their attorneys' fees. ECF No. 44 at 18-19. Under the
 10 "totality of the circumstances" presented here, I do not find this case to be exceptional so as to
 11 justify an award of fees under the Lanham Act. *SunEarth, Inc. v. Sun Earth Solar Power Co.*,
 12 839 F.3d 1179, 1181 (9th Cir. 2016). The damages and other relief I am awarding will
 13 sufficiently compensate the plaintiffs and sufficiently deter the defendants.

14 F. Remaining Claims

15 The plaintiffs did not seek summary judgment on their claims of business disparagement
 16 (Third Claim for Relief) and tortious interference (Fourth Claim for Relief). ECF No. 1 at 15-18.
 17 Because those claims are pending, it is premature to enter final judgment at this time. If the
 18 plaintiffs do not seek dismissal of those claims, they are to confer with the defendants to prepare
 19 and submit a proposed joint pretrial order in compliance with Local Rules 16-3 and 16-4 by
 20 **February 8, 2022.**

21 II. CONCLUSION

22 I THEREFORE ORDER that the plaintiffs' motion for summary judgment (**ECF No. 44**)
 23 is **GRANTED**. I award plaintiffs Munjed Al Muderis, dba Osseointegration Group of Australia,

1 and Osseointegration International PTY LTD the following relief against defendants Fred
2 Hernandez and AmpUtek, Inc.:

3 1. Damages totaling \$2,610,000 (calculated as \$2,400,000 in compensatory damages for
4 lost profits and loss of business, plus \$110,000 as disgorgement of the defendants' profits, plus
5 \$100,000 in punitive damages).

6 2. A permanent injunction against each of the defendants (and anyone acting under their
7 direction or control, current and future agents, and all persons in active concert or participation
8 with the defendants who receive notice of this order) from publishing or causing the publishing,
9 via the internet or any other medium, any of the following statements, or any variation thereof
10 that conveys the message associated with any such statement:

11 a. [A competitor's] parts are registered with the [United States Food and Drug
12 Administration].

13 b. To have [a competitor] perform osseointegration, the “[c]ost is half of what one pays in
14 Australia; yet patients undergo a comprehensive physio program that is headed by a
15 physicist (doctor of rehabilitation) and a team of accredited medical professionals.”

16 c. “The Dutch have been performing Osseointegration surgery since 2009, using press fit
17 implants. Their current implant is the newest device and most advanced on the market
18 today!”

19 d. “The letter [published on behalf of OIP] was not accurate, it was intended to deceive.
20 The Dutch utilize ce marked devices . . .”

21 e. “[T]he letter [published on behalf of OIP] . . . is riddled with inaccurate statements and
22 flat out lies. . . . [T]he OGA surgeon . . . regularly instructed me to post what he wanted
23 and to refute any other opinion or team; whether it be factual or not.”

1 f. "Regardless of what Nick Birbas says; they DO have CE certification of their implant
2 and have performed over 200 cases."

3 g. "The Dutch have spent the last 10 years not focusing on numbers or making money but
4 in collecting data, perfecting the technique and building a comprehensive physio
5 program; an actual system centered on team care; which is led by an actual Dr (sic) of
6 physical therapy (not simply a surgeons (sic) girlfriend who has less than a year
7 experience as a PT; yet is head of the program in Australia)."

8 h. "I smell a major cover up; as we have repeatedly asked for proof of CE certification or
9 if authorized by the Australian government as a custom; proof it was actually approved . .
10 . ."

11 i. Osseointegration surgery can be performed in the United States just as easily as it can
12 overseas and there is no need to travel overseas any longer to have the surgery performed.

14 Dated this 5th day of January, 2022.



15
16 ANDREW P. GORDON
17 UNITED STATES DISTRICT JUDGE
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